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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-173.

BOARD OF DIRECTORS AND OFFICERS, FORBES FEDERAL CREDIT UNION, CHARTER NO. 11258, FORBES AIR FORCE BASE, TOPEKA, KANSAS,
Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF PETITIONERS.

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NATIONAL CREDIT UNION ADMINISTRATION,
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REPLY BRIEF OF PETITIONERS.

The Board of Directors and Officers, Forbes Federal Credit Union, Petitioners, submit this brief in reply to the arguments first raised in the brief for the Respondent in opposition to the petition, as authorized by Rule 24.4.

I.

CONTEMPORANEOUS EXPLANATION OF THE CHARTER AMENDMENT.

The Government contends (Resp. p. 8) that a *contemporaneous explanation* accompanied the Administration's "interpretation" of the 1967 Amendment to the Forbes Charter. By "contemporaneous explanation" the Government is referring (via the Hearing Examiner's

Finding of Fact No. 4 Pet. App. A 23) to one of the informal, unofficial "bulletins" which, as the uncontroverted evidence establishes, was *never* received by Forbes' officers and directors and accordingly, could not equitably be regarded as "notice" either actual or constructive, of its contents (Tab 36, pp. 45-46, 48-50, 232-233). The record before the Agency below is completely devoid of evidence of any legally supportable "contemporaneous explanation" as asserted by the Government.

The issue therefore remains, namely, whether a regulatory agency can unilaterally amend a charter provision by merely characterizing its actions as "explanatory".

II.

LONG-STANDING INTERPRETATION.

The Government further asserts (Resp. pp. 8-11) that the Administration could "insist" upon obedience to its "long-standing" administrative interpretation of the common bond requirement. However, there is no evidence whatsoever that such a "long-standing" policy ever existed. To the contrary, the evidence unequivocally demonstrates that:

1. No regulations have *ever* been promulgated by the Administration interpreting the "common bond", although Congress expressly authorized the National Credit Union Administration to issue regulations as it may deem necessary for the administration of the statute. See 12 U. S. C. § 1766(a);

2. The Administration has granted charters where the words "and are receiving" have been included, *as well as* where this phrase has been omitted (Tab 37, R 9-10);

3. In fact, as recently as July of 1973, the Administration granted a charter to a Federal credit union where the

common bond has been expressly approved calling for a *nationwide* field of membership (Pet. pp. 19-20).

Thus, the issue remains, namely, whether an administrative agency can impose restrictions which fall outside the enabling statute, and without any clearly discernible pattern of consistency, but rather, in an arbitrary and selective manner.

III.

ESTABLISHED PATTERNS OF PRACTICE.

The Government asserts that the interpretation of the common bond as urged by petitioners, is at odds with the "established patterns of practice" in the credit union industry (Resp. p. 10). However, it has been established of record that *at least* two major credit unions, specifically, the Pentagon F. C. U. and the Navy F. C. U. have had their charters construed by the Administration so as to permit world-wide field of membership. The explanation of historical necessity as proffered by the Government (Resp. p. 10, n. 5) is hardly persuasive, in light of the national field of membership recently approved by the Administration in another profession-related credit union (Pet. pp. 19-20).

Thus, the issue remains, namely, whether the Administration can unilaterally modify the Federal Credit Union Act by inconsistently imposing a geographical limitation upon profession-related credit unions such as Forbes, contrary to the express language of the statute.

IV.

THE COMMON BOND.

The Government states (Resp. p. 11) that the membership in the Forbes Federal Credit Union is limited to persons who have a "common bond". This is in no way contested by petitioners. However, this is defined in 12

U. S. C. § 1759 as "groups having a common bond of occupation or association,

or

to groups within a well-defined neighborhood, community or rural district." The clear intent of the statute is that the former membership group (based on occupation or association) needs *no* geographical limitation, while the latter group (based on neighborhood, community or rural district), is by definition, geographically limited.

Thus, the issue remains, namely, can the Administration attempt to impose conditions and limitations on professionally associated credit unions, contrary to the express language of the statute.

V.

THE ADMINISTRATIVE PROCEDURE ACT.

The Government asserts (Resp. p. 11, n. 6) that Forbes failed to raise in the Court below, the fact that the Administration did not follow the formal rule-making procedures of the Administrative Procedure Act, 5 U. S. C. § 551 et seq. This is simply incorrect. To the contrary, this was briefed and argued before the Court of Appeals (see Reply Brief of Petitioners, p. 4), as well as before the Hearing Examiner (Tab 36, pp. 48-49).

Thus, the issue remains, namely, whether an administrative agency may impose substantive conditions and restrictions by means of an informal "bulletin" contrary to the rule-making process expressly mandated by Congress in the Administrative Procedure Act, as well as in the Federal Credit Union Act.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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